



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 24 OF 2016

BETWEEN

GEOFFREY MANGERA OMWOYO.....APPLICANT

AND

YOBENCIA KEMUNTO KEMONI.....FIRST RESPONDENT

MARGARET NYAITODI GWOMA.....SECOND RESPONDENT

(Being an application for Leave/Certificate to appeal to the Supreme Court of Kenya)

RULING OF THE COURT

1. On 4th March, 2016, this Court delivered a judgment in **Civil Appeal No. 20 of 2014** where the appellant's appeal against the respondents was dismissed. In the High Court case that gave rise to the appeal, the respondents had sought re-survey of a sub-division of a parcel of land that had been sold to the appellant by the late **Kemoni Osemo**, the deceased husband of the first respondent, claiming that the appellant had encroached onto their land.

2. The trial court found for the respondents and ordered a re-survey of the suit land known as **Matutu Settlement Scheme/215**. The respondents' parcel of land, which is adjacent to the suit land, is known as **Matutu Settlement Scheme/214**. This Court upheld the High Court judgment.

3. The re-survey established that the appellant's land ought to have been 4 acres whereas the respondents' land ought to have been 15.5 acres. The appellant was, however, occupying a bigger parcel of land measuring 8.5 acres instead of 4 acres.

4. Aggrieved by this Court's judgment, the applicant has now filed an application dated 24th March, 2016 seeking leave to file an appeal to the Supreme Court. Pending hearing and determination of the intended appeal, the appellant also seeks stay of execution of this Court's judgment and/or an order to restrain the respondents from demolishing his residential houses which he claims are erected on the disputed parcel of land.

5. **Mr. Kemboi**, learned counsel for the appellant, submitted that the judgment of the High Court that was upheld by this Court interfered with the appellant's sanctity of his title and in his view; this is an issue of

great public importance that ought to be referred to the Supreme Court for a final determination. He contended that the re-survey that was ordered was not properly done.

6. Counsel added that the respondents' surveyor had purported to hive off a portion of the suit land on which the appellant's home stands. That is why the appellant is seeking for an interim stay of execution pending hearing and determination of the intended appeal to the Supreme Court.

7. The respondents opposed the application. In an affidavit sworn by the second respondent, they stated that the re-survey that was ordered by the High Court was done in the year 2012 and since then they had not interfered with the appellant's 4 acres of land.

8. **Mr. Mbunde**, learned counsel for the respondents submitted that the intended appeal had not raised any issue of general public importance that required to be addressed by the Supreme Court. He further pointed out that the re-survey had not interfered with the appellant's homestead. He urged the Court to dismiss the application.

9. We have considered the affidavits on record as well as submissions by counsel. Although the application before us is brought pursuant to **rules 30 (1) and (2) of the Supreme Court Rules** and **rules 24 (1) of this Court's Rules**, the applicable provisions under which the application ought to have been brought is **Article 163 (4) (b) of the Constitution of Kenya, 2010**. For this Court to grant a certification to the appellant to move to the Supreme Court, the Court must be satisfied that a matter of general public importance is involved in the intended appeal.

10. In **HERMANUS STEYN PHILIPUS STEYN V GIOVANNI GNECCHI RUSCONE [2012] eKLR**, this Court set out the factors to be considered in determining what constitutes a matter of public importance. The Court held:

“The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law”.

11. The appellant's advocate submitted that the issue that is intended to be canvassed before the Supreme Court, if certification is granted, is about sanctity of title. In his view, this is a matter of general public importance. We do not agree. The appellant has not satisfied any of the requirements set out in **HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI RUSCONE (Supra)** where the Supreme Court adopted this Court's above proposition in **HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE [2013] eKLR**.

12. We find the application lacking in merit and dismiss it with costs to the respondents.

DATED and Delivered at Kisumu this 16th day of December, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR